



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal No. 310 311& 312 of 2001

LABAN KIMONDO KARANJA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 311 OF 2001

LABAN MAINA NJUNGU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 312 OF 2001

GEORGE MURIITHI MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeals from the judgment of A.B.L. Musiega, Senior Resident Magistrate, dated 17th October 2001, in the Senior Resident Magistrate’s Court at Karatina, Criminal case No. 350 of 2001)

NOTE:

No retrial where the original trial is a nullity and the relevant conviction or acquittal quashed or set aside on account of prosecution by an unqualified prosecutor.

JUDGMENT

These three appeals were consolidated for hearing and in this judgment, Laban Kimondo Karanja may be referred to as the First Appellant and Laban Maina Njungu as the Second Appellant while George Muriithi Maina may be referred to as the Third Appellant. In the trial court the three were the First Accused, the Third Accused and Fourth Accused, respectively. The Second Accused Simon Mwangi

Kahora was acquitted for lack of evidence under section 210 of the Criminal Procedure Code.

The four were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code, particulars alleging that on the 11th day of July 2001 at Ndimaini village in Nyeri District, Central Province, the four accused persons jointly with another not before court unlawfully assaulted Joseph Mwangi Gachanja thereby occasioning him actual bodily harm.

The three appellants were each convicted and fined Ksh.2000/= or in default two months imprisonment. That was a lenient sentence as the trial magistrate himself pointed out. But the appellants were not satisfied and therefore appealed as already stated above.

During hearing of the appeals, Mr. Macharia Wahinya, advocate appeared for the three appellants while Mr. Charles Orinda, Principal State Counsel, appeared for the Respondent. They both agreed that the trial of the appellants was a nullity because the prosecutor, police sergeant Njagi, was not a qualified prosecutor in terms of section 85 (2) of the Criminal Procedure Code as considered by the Court of Appeal in the case of **Roy Richard Elirema & Another v/s Republic**, Criminal Appeal No. 67 of 2002 at Mombasa. Mr. Orinda, therefore conceded the appeals but proceeded to urge this court to order retrial arguing that the offence was committed in broad day light at 11.00 am between people who knew each other. He went on to say the evidence was water tight and that a retrial would not be prejudicial to the appellants who were on bond during the trial and paid fine on conviction so that they had not been in custody for a long time.

Mr. Macharia did not accept retrial pointing out that retrial is not automatic and ought not be ordered in this case after a period of four years and seven months following the conviction and sentence the availability of witnesses and exhibits notwithstanding. He cited the court of Appeal decision in Cr. Appeal No. 151 of 2004 at Eldoret, **Benard Lolimo Ekimat – vs – Republic** (unreported) and the East African Court of Appeal decision in **Ahmedi Ali Dharamsi Sumar– vs – Republic (1964) E.A. 481** where, in each decision, the learned Judges of Appeal said that

“whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person.”

He concluded that in these three appeals, interest of justice does not require retrial and such a retrial is likely to cause injustice.

That being the position, I see no reason why I should delay my decision on the issue of nullifying the trial which has no dispute. Accordingly, I do hereby declare the trial of the three appellants in criminal case No. 350 of 2001 in the Senior Resident Magistrate’s Court at Karatina, a nullity, quash the convictions therein and set aside the sentences imposed upon the appellants. Any fine paid on account of that trial by any of the appellants be refunded to the appellants.

Having said that, I now remain with only one main issue to resolve. That is whether there should be a retrial of the appellants or not.

To resolve that disagreement between Mr. Orinda and Mr. Macharia on the issue of retrial, the answer would have been short and straight forward since this is a case where, as agreed by both sides, the trial was a nullity because the prosecution of the Appellant was conducted by a prosecutor who was not qualified to prosecute under section 85 (2) of the Criminal Procedure Code. But since it seems we live on Planet Kenya where it seems nobody, including those in the legal profession, wants anything be certain so that, even without real and requisite chemical and physical change, red can be white or blue or black or any colour, depending on the whims and wishes of the actor, yet the real and correct colour remains red throughout despite the myopic ends; we find ourselves in the present situation where courts are wavering on the correct principles applicable in this particular aspect of judicial proceedings where a trial is a nullity and conviction thereof quashed or set aside for failure by the prosecution to comply with section 85 (2) of the Criminal Procedure Code, and the answer has to be long and its course meandering as we

have to start with consideration of

“the particular facts and circumstances of each case.”

The question is whether, as Mr. Orinda claims, there was water tight evidence against the appellant. The reality as concerns direct evidence on the issue whether the appellants assaulted the complainant or not is that the court has the word of the complainant pw1, and his brother in law, pw2, on the one hand against the word of the three appellants on the other. In terms of numbers, the appellant’s side has a majority of one person. But in law the prosecution had the duty of proving the prosecution’s case against each appellant beyond reasonable doubt. That standard of proof had to be achieved before it could be said the evidence against the appellants was watertight. The prosecution therefore brought a total of five witnesses who included one police officer and two witnesses each giving medical evidence.

To begin with, while part of the prosecution’s evidence refers to five identified people as the only individuals who participated in the alleged assault against the complainant Joseph Mwangi Gachanja who gave evidence as pw1, another part of the prosecution’s evidence talks of a mob of unidentified individuals as the assailants. While part of the prosecution’s evidence says that the attack took place along a rail line, another part of the prosecution’s evidence says that the attack took place along Ndimaini-Karatina Town road. While part of the prosecution’s evidence says that the complainant reported the assault to Karatina police station on 11th July 2001, another part of the same evidence says that the report was made on 12th July 2001. While part of the prosecution evidence says that the complainant was treated at Karatina District Hospital, another part of the same evidence says that the complainant was not treated at Karatina District hospital because he had been treated at Central Health Clinic, a private health clinic at Karindundu in Karatina town. While one part of the prosecution’s evidence says the five people who assaulted the complainant, were apparently, waiting on the road, another part of the same evidence says that the assailants came from the opposite direction shouting:

“These are the people. Cut them into pieces.”

While one part of the prosecution’s evidence says that when pw1 and pw2 were running away from the assailants, pw1 and pw2 took the same route, another part of the same evidence says that pw1 and pw2 took different routes.

Furthermore, the weapons pw1 told the court the assailants were armed with did not tally with the weapons pw2 told the court the assailants were armed with. Pw1 talked of small metal bars, sticks and a simi. Pw2 talked of walking sticks, rungus and Somali swords.

When it comes to the evidence concerning alleged injuries on the body of the complainant, it is found that pw1 gave his own version, pw2 his own version, pw4 Yusuf Karuri Ndegwa, a Clinical Officer from Karatina District Hospital his own version, and pw5 Zachary Githui Muriuki the proprietor of Central Health Clinic and along term acquaintance of the complainant, his own version. Each version inconsistent with the other version. Even from the complainant himself; his list of injuries would keep on varying as long as he continued giving evidence not only during his evidence in chief but also during cross examination and examination by the court. Pw5 would not care separating the injuries the complainant had received as a result of a road accident in 1999 from the injury, he alleged the complainant received as a result of the alledged assault on 11th July 2001, but surprisingly he would assess the totality of all those injuries as harm.

Although this is a case which has arisen out of a dispute between parties who used to belong to one Coffee Society, namely Gakuyu Farmers Co-operative Society, affiliated to K.P.C.U. but now split by members who favour affiliation to Thika Coffee Millers, the prosecution failed to bring out that aspect of the case and therefore failed to prove that indeed pw1 and pw2 were going to attend a farmers society meeting at Ndimaini Trading Centre and that such a meeting did take place. A case where the complainant could, on 11th July 2001 after the alleged assault, go to Karatina town and fail to report the assault to Karatina Police Station until 12th July 2001 for the well known and available accused persons to be

arrested more than one month after the alleged incident following police recording of statements from pw1 and pw2 thirteen days after the alleged assault.

I should remark that although today the Respondent may claim that exhibits and witnesses are available for retrial, I do entertain serious doubts because that is easier said than done. This is a period of four years and seven months. Who knows where P.C. David Chesire is, for example? Yet the same prosecution cannot, for example today, trace a prominent doctor who performed a postmortem examination at the Provincial General Hospital Mortuary in Nyeri town, or at any other hospital, as near as late the year 2004. Such and similar incidents are not uncommon in our trial courts in this country.

That ends the part of this judgment exposing the particular facts and circumstances of this case and two questions come to my mind. Suppose the prosecutor were qualified in terms of section 85 (2) of the Criminal Procedure Code, and Mr. Orinda, in his submissions during hearing of these appeals, included a prayer for a trial in the event the appeals were allowed especially since he has said the evidence against the appellants was water-tight. The first question is whether I would have ordered retrial after allowing the appeals. If the answer to the first question is in the negative, the second question is; why should I now order retrial where the prosecutor was unqualified to prosecute the same case.?

I will try to answer those two questions looking at the issue of retrial closely. As it will be seen latter, retrials have been considered and ordered or refused in many criminal cases where the prosecutor was qualified to prosecute and therefore in those cases the issue of unqualified prosecutor did not arise. The first question above is relevant to such a situation. The second question is not.

When answering the two questions, I may have to touch on various other aspects of the issue of retrial. In ***High Court Criminal Appeals No. 70 of 2000 and No. 71 of 2000 as well as No. 18 of 2001, Pharis Mutembei Mutegi – v – Republic; Christopher Mutwiri Njoka – v – Republic; and Erustus Mugambi Mutegi – v- Republic*** respectively and consolidated, also referred to herein after as ***Pharis Mutembei Mutegi case*** the learned State Counsel at Embu then handling the appeals for the respondent Republic, in urging me to order retrial came up with a curious argument which I have also heard in a few other cases and Mr. Orinda could have had it at the back of his mind in these appeals stating that the irregularity which was there was permitted by the court. He said the trial court should have either stayed the proceedings on the ground that the court was not properly constituted or the court should have given the person who was prosecuting before it permission, under section 88 (1) of the Criminal Procedure Code, to prosecute. Since the court did not do so, there should be retrial. In reply counsel representing the appellants argued that it was not the business of the court to see that the prosecutor is qualified. It was the Attorney General's duty to do so.

My views on that is that many times courts have been made scapegoats. They have many times been blamed where people outside courts should be blamed yet no finger is pointed at the people correctly responsible. Sometimes courts have invited blames upon themselves even where courts should not be blamed. That will be the day when people of this country will know that courts do not prosecute for the Republic, for plaintiffs, for defendants or for any other party. Courts do not prosecute cases for them. Courts are there only to adjudicate in disputes between those parties and do so in accordance with the law.

As the Attorney General is blamed for using unqualified Prosecutors, courts cannot and should not be equally blamed for permitting unqualified Prosecutors to prosecute cases because while the law confers power and imposes duty upon the Attorney General to appoint prosecutors, the law does not do the same to courts. Although a court may refuse to allow an unqualified person to prosecute before it as a public prosecutor, that court has no obligation under the law to do so. Where an unqualified person has prosecuted as a public prosecutor before a court therefore, failure by the court to disallow him prosecute should not be used as one of the grounds upon which a retrial should be ordered. As it is clearly illustrated in a passage from UGANDA versus MILENGE AND ANOTHER, (1970) E.A. 269 quoted by the Court of Appeal in Roy Richard Elirema's case:

“It is essential to consider the powers such as the State Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to all and that he, at any rate, at the trial,

has complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence, and it is from this power that the practice has arisen for a prosecutor who does not desire to proceed with the prosecution against an accused person to offer during the course of the trial 'no evidence' or 'no further evidence'. This results in the evidence for the prosecution 'being closed' and the court then acts under section 209 (section 210 of the Kenyan code) and if a case has not been made out sufficiently to call an accused person to make his defence then the court dismisses the case and acquits the accused....."

Their Lordships in the case of Roy Richard Elirema noted that from the above passage, it is clear that in a criminal prosecution, there must be a prosecutor to discharge certain functions, which functions cannot be discharged by the court before which the prosecution is being conducted. They added that that proposition is inherent in the fact that in Kenya the Administration of justice is operated on the "adversarial system" in which it is assumed (and this is important) that each party or side to the dispute knows best what its case is and can and must be expected or assumed to know best how to present its side of the case to the court. According to section 77 (1) of the Current Constitution of Kenya, that court is to be "independent and impartial court established by law." If the court is to be as stipulated by that provision of the constitution, that court cannot at the same time perform the role of either the prosecutor or a defence counsel and therefore the role of prosecuting can only be performed by a prosecutor, whether public or private.

It is in respect of a private prosecutor that section 88(1) of the Criminal Procedure Code may be invoked. It states:

"A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney General in this behalf shall be entitled to do so without permission."

What that provision means is simply this: When it comes to

"a public prosecutor or other officer generally or specially authorized by the Attorney General....."

a magistrate trying the case has no business giving permission. The magistrate gives permission only to a private person so that he, the person, becomes a private prosecutor and in that respect the permission of the magistrate becomes a condition precedent. It follows that it is not correct to say that the magistrate trying a case could have permitted a person purporting to prosecute as a public prosecutor to prosecute in that behalf. He has no power. He has no power, by virtue of that permission to convert a person purporting to prosecute as a public prosecutor, into a private prosecutor.

Moreover if he were to play that role, he would cease to be "independent and impartial" because he would have converted a public prosecution into a private prosecution contrary to the wishes of the Republic which in the circumstances could surrender the case, if it could, to the magistrate to direct the private prosecution while at the same time the magistrate is adjudicating over the dispute.

To appreciate what I am saying section 88(1) should be read together with section 85 of the Criminal Procedure Code. The latter section states:

"85 (1) The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney General, by Writing under his hand may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purpose of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney General."

Provisions of section 86 of the Criminal Procedure Code are also useful. They state:

“A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under trial or appeal; and if a private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution, and the advocate so instructed shall act therein under his directions.”

It was with sections 85 and 86 in mind that the framers of this Criminal Procedure Code inserted section 88 and bearing in mind the current constitutional powers the Attorney General has under section 26 of the present Constitution of Kenya, there is no room for the court to play any part with respect to public prosecutors. Sergeant Njagi could not therefore get permission of the magistrate to prosecute even if he or the magistrate wanted to. Moreover, with Sergeant Njagi, even if the Attorney General wanted him to be a public prosecutor, the Attorney General could not appoint him because under subsection (2) of Section 85 a Sergeant is not qualified to be appointed a public prosecutor. The Sergeant was not therefore entitled to be appointed to work as a public prosecutor.

At this stage and before I leave this part of this judgment, perhaps it is better to say who the “Complainant” is. The term “Complainant” may not sometimes be understood in Criminal proceedings and it has even been said that retrials are necessary so that interests of complainants are taken care of.

Section 202 of the Criminal Procedure Code is the key provision. In that section, as the Court of Appeal in ***Roy Richard Elirema*** noted, there is no mention of a prosecutor, whether public or private. The parties named in section 202, for example, are the “complainant” and the accused person. If the “Complainant” is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “Complainant” in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic, and when a public prosecutor is present in a trial in the court, the “Complainant” is said to be present.

When there is talk of the interest of the “Complainant” therefore, I take it to mean the interests of the victim and not the interests of the Republic who, through the Attorney General’s failure to comply with section 85(2) of the Criminal Procedure Code, has used unqualified persons as public prosecutors.

Having said all the above, I will now look at a few of the ***Roy Richard Elirema*** category of cases where, for the first time, the issue of whether there should be retrial after a conviction has been quashed on the ground that the prosecutor was unqualified arose. These were the first cases where that issue arose starting with ***Roy Richard Elirema*** (supra); ***Wilfred Shilingi, Edwin Lundi and Andrew Okungu – v – Republic***, Criminal Appeal No. 210 of 2002 at Mombasa. (Wilfred Shilingi’s Case). ***Silverster Keli Kakumi – v – Republic***, Criminal Appeal No. 142 of 2002 also at Mombasa (Silverster Keli Kakumi’s Case); respectively. The aim is to see whether principles emerge from those cases on the issue of retrial.

Roy Richard Elirema was the pioneer case. In refusing to order a retrial of Roy Richard Elirema and his Co-Appellants, the Kenya Court of Appeal said:

“We note that the alleged offence took place in January. That is a period of over four years. The main witnesses; i.e. the victims of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya. The mistakes which have led to our quashing the convictions were entirely of the prosecution’s making. There is still the issue of whether the offences were committed within Kenya or within Tanzania and hence whether the Kenya courts had jurisdiction at all to try the appellants. We do not think it is necessary or expedient for us to decide that issue but in considering the question of whether or not we should order a retrial, we are entitled to take that factor into account. Taking all these matters into consideration, we do not think that it would be just to the appellants to subject them to a fresh trial.”

That was the Court of Appeal’s first judgment of this nature. It was delivered on 5th August 2003 by a Bench of three judges consisting of Omolo J.A., Tunoi J.A. and Lakha J.A.

Later on the same date the same Bench decided a similar case, the **Wilfred Shilingi** case (Supra) stating:

“For the same reason we have given in our judgment in the appeals of Roy Richard Elirema and Vincent Joseph Kessy, Mombasa Criminal Appeal NO. 67 of 2002, we allow the appeal of Wilfred Shilingi, Edwin Lundi and Andrew Okungu, and we quash all the convictions recorded against each one of them and set aside the sentence imposed on each of them. We equally do not think that it would be right for us to subject them to a new trial some four years after the offences charged against them were allegedly committed. The mistakes which occurred during their trial and which have led to our quashing the convictions were all of the prosecution’s making. There is absolutely no reason why the Attorney General should not appoint qualified public prosecutors to conduct the Republic’s cases in the courts. Accordingly, we refuse to order a re-trial.....”

Their Lordships went ahead to order immediate release of the Appellants. The reasons they had given were reasons for refusing to order retrial. They were not reasons for ordering retrial.

Two days later, a different Bench of the Kenya Court of Appeal also sitting at Mombasa granted a retrial in another similar case, the **Silvester Keli Kakumi** case (Supra) decided on 7th August 2003 by their Lordships Kwach J. A., O’Kubasu J. A. and Waki J. A. Not much is said in that judgment. It simply says:-

“The trial of the appellants was conducted by a police corporal. In view of the decision of this court in Criminal Appeal No. 67 of 2002 ROY RICHARD ELIREMA AND ANOTHER – V- REPUBLIC that trial was a nullity. We quash the conviction and set aside the sentence. In view of the gravity of the offence charged we order that the appellant be re-arrested, charged and tried before another court of competent jurisdiction with a competent prosecutor.”

Although the short judgments in **Wilfred Shilingi’s** case and **Silvester Keli Kakumi’s** case do not reveal the nature of the charge which faced Appellants in those two cases and the sentences imposed, the head lines in the relevant judgments, the strength of the bench in the High Court and the Court of Appeal, in addition to what was said in respect of each case suggest that the charge in each case was robbery under section 296 of the Penal Code. While **Wilfred Shilingi’s** case appears to have been under subsection (2) of section 296 of the Penal Code and therefore the sentence imposed had to be death, **Silvester Keli Kakumi’s** case appears to have been under section (1) of section 296 of the Penal Code and therefore the sentence imposed had to be less drastic than the death sentence. I am led to this conclusion from the fact that the High Court Bench which heard **Silverster Keli Kakumi’s** case consisted of a single judge in the person of a Commissioner of Assize and a single judge is, in the present legal practice in Kenya, not taken to be wise or competent to hear a criminal appeal where the appellant was charged, convicted and sentenced under section 296(2) of the Penal Code.

That being the position therefore, or even assuming that **Silvester Keli Kakumi** had been charged, convicted and sentenced to death under section 296(2) of the Penal Code, what specific grounds do we derive from the Court of Appeal’s three decisions in those three cases to justify a retrial of the Appellant whose trial had been a nullity in terms of the Court of Appeal’s decision in the case of **Roy Richard Elirema’s** case? What are the principles that emerge ?

In **Roy Richard Elirema’s** case, there is no specific ground given as the court in that case in refusing retrial never gave a ground upon which retrial could be ordered. A similar situation obtained in **Wilfred Shilingi’s case**. The court did not give any ground upon which a retrial could be ordered. It is only in **Silvester Keli Kakumi’s** case where a specific ground for ordering a retrial was given and that ground was stated to be:

“the gravity of the offence charged.”

Nothing was said about the length the charge had taken, the availability of witnesses or exhibits, the jurisdiction of the court etc. as may have been suggested in **Roy Richard Elirema’s** case.

I have indicated above that the offence charged in **Silvester Keli Kakumi's** case could most probably have been under section 296 (1) if not under section 296 (2) of the Penal Code. I add that it could even have been under a lesser drastic section of the Penal Code than section 296 (1). In those circumstances, what "gravity" was there in the offence charged in that case which surpassed the "gravity" in the offences charged in **Roy Richard Elirema's** case and **Wilfred Shilingi's** case which were under section 296 (2) so as to oblige the court to order retrial in **Silvester Keli Kakumi's** case? The Court of Appeal in **Silvester Keli Kakumi's** case never attempted to answer that question before ordering retrial and therefore the question remains unanswered to-date.

On the other hand, what meaning does one attach to the phrase:

"the gravity of the offence charged."

No doubt the meaning is relative to one's perception attached to that phrase; so that while the Court of Appeal Bench which decided the case of **Roy Richard Elirema** and the case of **Wilfred Shilingi** could see no "gravity of the offence charged" under section 296 (2) as a reason to warrant re-trials in those cases, the Court of Appeal Bench which decided the case of **Silvester Keli Kakumi** could see "gravity of the offence charged" to warrant a retrial even though the charge was also under 296(2) or was under a lesser drastic provision such as section 296(1) or other even much more lesser drastic provisions of the law. Moreover, it is being added that the interests of the "complainant" must be taken into account, yet there is a "complainant" in every criminal case.

In those circumstances, it seems to me, with all due respect, that the Court of Appeal's decision in **Silvester Keli Kakumi** and those who are pleading the interests of the "complainant" are trying to take away the good that the Court of Appeal had given in its decisions in the case of **Roy Richard Elirema** and the case of **Wilfred Shilingi**. That way there is likely to be no improvement because the law will not be clear and the prosecution is encouraged to keep on asking for retrials in every appeal where trial declared a nullity on the basis of non compliance with section 85(2) and courts will be granting those requests as the phrase "gravity of the offence charged" is so generous that it will and can be used and accepted in almost every situation. The appeals before me in this judgment vindicate what I am saying. The appellants were convicted and sentenced under section 251 of the Penal Code. The gravity of the charge under section 251, is much more less than the gravity of the charge in section 296(2) yet in all the appeals I am being asked to order retrial. Add to that the factor of the interests of the "complainant". That way, where is the case which will not have a retrial in this category of cases?

In any case, a relevant question to ask is: What mischief is the Court of Appeal's decision in **Roy Richard Elirema's** case as made clearer in the same court's decision in **Wilfred Shilingi's** case, trying to stop? The mischief is not to stop or facilitate retrials and the question of fettering the power of this court in ordering retrials is neither here nor there. The mischief is not the avoidance or refusal by courts to grant retrials. The mischief is not a refusal by courts to look into the interests of complainants (victims) and or accused persons, both of them innocent sufferers, in trials subsequently nullified because of prosecutions by unqualified prosecutors.

The mischief is simply this: To stop the Honourable the Attorney General or the prosecution from using unqualified prosecutors to prosecute criminal cases in our courts. In general terms the mischief to be prevented is "**prosecution by unqualified prosecutors**". To succeed, that stoppage should be done without allowing loopholes, like retrials, through which the Attorney General or the prosecution is being encouraged to continue using unqualified public prosecutors with the knowledge that when original trials are nullified, retrials will be ordered. It is the allowing of such loopholes that will lead to grave injustice to the victim and the Accused as it will cause more missaries to them in varied ways and definitely there will be no fair trial. The law must be made clear with defined boundaries known to everybody and the Attorney General or the prosecution must be told in no uncertain terms that this is the law. It should not be ambiguous. They have had too much time to correct the situation. They have had many years to do so and did not have and do not have to be told by the court to do so. They have not corrected it. They did not have and do not have to be told by the court to do so. But if the court must tell them, then they should not be allowed any more time to relax as the situation now calls for instant stoppage which can only be

achieved by allowing no retrial where a trial is a nullity because of prosecution by an unqualified prosecutor and here I am not talking about an ordinary person. I am talking about a person who, according to section 26 of the Current Constitution of Kenya, is not only the Principal Legal Adviser to the Government of Kenya but also in charge of all criminal prosecutions in the country. Having used unqualified public prosecutors in the country's court for so many years, why should he be given the opportunity to retry the affected accused persons when they did not contribute to his complacency with regard to his compliance with section 85(2) of the Criminal Procedure Code? There is completely no good reason.

In my view therefore the Court of Appeal's decision in **Roy Richard Elirema's** case as made clearer in **Wilfred Shilingi's** case is the decision to be followed and in so far as the decision in **Silvester Keli Kakumi's** case is inconsistent with decisions in the other two cases and introduces uncertainty on the issue of retrial, the decision in **Silvester Keli Kakumi's** case on that issue should be disregarded. A good law must be ascertainable in order to serve the society satisfactorily and the argument that the court should not fetter its power should be used carefully if certainty must be in our law. Such argument should not be used to create unpredictable situations.

It is in the Court of Appeal's decision in the case of Wilfred Shilingi that the court brings out the main and full reason for refusing to grant a retrial. That reason is that:

“The mistakes which occurred during their trial and which have led to our quashing the convictions were all of the prosecution's making. There is absolutely no reason why the Attorney General should not appoint qualified public prosecutors to conduct the Republic's cases in the courts. Accordingly, we refuse to order A retrial.....”

That is the main and full reason for refusing retrials in the Roy Richard Elirema category of cases. Other reasons like the length the charge has taken, the gravity or seriousness of the offence charged, the merits and demerits of the case, availability of witnesses and exhibits, interest of the victim or the missaries caused to him, are all peripheral reasons which should not be used to entitle the Attorney General, or the prosecution, to retrials. They have to pull up their socks so that the Republic avoids causing missaries and injustice to victims through prosecution by unqualified public prosecutors. It is important that today the law is made tight upon the Attorney General or the prosecution so that the suffering of the few today, if any, gives way to no more suffering of anybody, on this account, in the future for ever and ever.

Where, therefore a conviction is quashed or set aside because the trial was a nullity on account of prosecution by an unqualified prosecutor, the accused person or the appellant or the applicant affected must be set at liberty and face no retrial.

As I may be doubted in so concluding, let me look at one case decided latter by the Kenya Court of Appeal on the issue of retrial on account of the prosecutor having been unqualified; also look at one High Court judgment from Nairobi and thereafter look at a few other relevant authorities on the issue of retrial decided by courts in Eastern Africa. This last mentioned group of cases were decided before the **Roy Richard Elirema** category of cases emerged and therefore none of them dealt directly with the question of an unqualified prosecutor. Nevertheless they are cases from which principles on the issue of retrial do emerge and ought to be observed and applied in our courts of law.

To begin with, the Kenya Court of Appeal in **Silvester Keli Kakumi's** case having ordered retrial because of

“the gravity of the offence charged”

without explaining how they looked at the reasons given by the same court in **Roy Richard Elirema's** case as clarified in **Wilfred Shilingi's** case for refusing to order retrial, the totality of those three decisions gave no clear direction on the principles applicable as those principles could not emerge from the reasons advanced in those three cases. Accordingly, no principles on the issue of retrial emerge from the three decisions though reasons for refusing to order retrial had been given in two of the cases and the reason for

granting retrial given in the third case.

In subsequent cases therefore, the Kenya Court of Appeal has tried to harmonise its decisions in **Roy Richard Elirema, Wilfred Shilingi** and **Silvester Keli Kakumi** by relying on the principles that each case must depend on the particular facts and circumstances of that case and that an order for retrial should only be made where interests of justice require it.

One of those subsequent cases is **Benard Lolimo Ekimat – v – Republic Criminal Appeal No. 151 of 2004 at Eldoret** which was an appeal in the Court of Appeal from a decision of the High Court at Eldoret in which the High Court had dismissed the Appellant's appeal and upheld the decision of the trial magistrate's court convicting the Appellant and sentencing him to death. The appeal in the Court of Appeal was on the basis of only one ground, a ground which had not been raised in the High Court, and that was.

“That the proceedings in the trial court are nullity.”

Though not a ground in the High Court appeal, the Court of Appeal, relying on **Roy Richard Elirema's** case entertained the appeal on the basis that the court could not ignore it because it raised a question of law relating to jurisdiction.

The case involved a peculiar aspects of cases where retrial is an issue on the basis of an unqualified prosecutor. The trial magistrate had, on the main hearing date, failed to record the coram in a clear manner to show those who were present, merely using the words

“Coram as before”

when the record ***“before”*** was also unclear as to the people who had been present or had been appearing. Of importance was the presence of a prosecutor. The record was not disclosing whether there was a prosecutor, and if there was one, what his rank was in terms of section 85(2) of the Criminal Procedure Code.

During the hearing of the appeal in the Court of Appeal therefore, there was presumption in favour of the Appellant that either there was no prosecutor or if there was one, he was not a qualified prosecutor under section 85(2). In either situation the trial was a nullity and this was unanimously agreed.

But the State wanted a retrial. Who was to blame? Was it the Appellant, then accused? The court of Appeal did not pinpoint, but if the prosecutor ever failed to appear, then the Court and the prosecution were both to blame. Otherwise the court alone would be to blame as the Accused had no blame on his side and the prosecution could not be blamed alone in the circumstances of that case. To my mind, there having been a presumption that either there was no prosecutor or if there was one, he was not qualified in terms of section 85(2) of the Criminal Procedure Code and that therefore the trial was a nullity, and the conviction having been quashed on that assumed ground, it must further be presumed that the court and the prosecution were both to blame. This was therefore a clear case where retrial could not be ordered on any facts and in any circumstances. Their Lordships having referred to the case of **Ahmed Ali Dharamsi Sumar – V- Republic (1964) E.A. 481**, and relying on

“the principle ----that each case must depend on the particular facts and circumstances of that case” and that “an order for retrial should only be made where interests of justice require it”

declared the trial a nullity; quashed the conviction of the Appellant and refused to order a retrial stating:

“In our view, having carefully considered various aspects of the case including the charge, that was before the court plus the evidence that was adduced in support of it and the period the appellant has stayed under confinement, we are of the view that it would not be in the interest of justice to order a retrial and we do decline to do so.”

The Appellant had been under confinement for three years by then.

Despite the good decision, in that the court refused to order retrial, I find it puzzling that the Court of Appeal in its reasons in that case never included that brilliant, important or fundamental reasoning they had advanced in the case of Wilfred Shilingi, a reasoning which, like a bell, ought to be ringing through all court judgments and decisions on the issue of retrials in **Roy Richard Elirema** category of cases. For ease of reference, it is in quotes given earlier in this judgment. Unfortunately that is not happening. Hence the present situation.

It is in that light that I refer to the judgment of three High Court judges, at Nairobi, in **Nyeri Criminal Appeal No. 415 of 2002, John Kariuki Kamau –v – Republic and Nyeri Criminal Appeal No. 416 of 2002, Paul Mwangi Maina –v- Republic**, consolidated. Those two appeals were taken from the High Court at Nyeri to the High Court at Nairobi where a bench of three judges was constituted under section 359(2) of the Criminal Procedure Code because a two judge bench at Nyeri, while unanimous in allowing the appeals and quashing the appellant’s conviction on the ground that the trial of the appellants was a nullity because part of the prosecution was conducted by a prosecutor who was not qualified in terms of section 85(2) of the Criminal Procedure Code, did disagree on the issue of whether there should be a retrial or not.

This was one of the **Roy Richard Elirema** category of cases as the **Roy Richard Elirema** case was the authority both High Court benches relied upon to declare the trial of the appellants a nullity and quash the convictions. However, with respect, it appears that the bench of three Judges at Nairobi when handling the case, wrongly, thought that the judge at Nyeri who refused to order retrial did so because that judge does not accept there should be any retrial under any circumstances and facts in every category of cases. The learned judges therefore said everything they wanted be said in favour of ordering retrials generally and said nothing showing specifically when a retrial should not be ordered. Of the three related Mombasa Court of Appeal cases on that issue, the **Roy Richard Elirema** case was the only one cited, and therefore the Court of Appeal’s fundamental reasoning in **Wilfred Shilingi’s** case to refuse ordering retrial in Roy Richard Elirema Category of cases was not considered. Instead the only part which was considered was what was said in **Roy Richard Elirema** case that it was over four years since the offence had been committed, that the main witnesses were apparently citizens of Somalia and their availability in Kenya was doubtful, that there was the question of jurisdiction of the country in which the trial could properly take place as between Kenya and Tanzania and that the mistakes which had led to the quashing of the convictions were entirely of the prosecution’s making. The learned judges of the High Court at Nairobi with all due respect, do not seem have seen much in the last mentioned reason.

With the exception of the last mentioned reason, the rest are what I referred to earlier as peripheral factors which should not, by themselves make the court order retrial in Roy Richard Elirema category of cases.

At the end, the High Court at Nairobi summarized the principles an appellate court should apply in determining whether to order a retrial as follows:

“1. A retrial may be ordered only when the original trial, was illegal or defective (MANJI –V- REPUBLIC, MERAL – V- REPUBLIC AND MWAURA–V-REPUBLIC).

2. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person (SUMAR –V- REPUBLIC, MANJI –V- REPUBLIC, MWAURA –V- REPUBLIC).

3. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result (MWANGI – V – REPUBLIC).”

Finally, the High Court at Nairobi ordered a retrial of the Appellants relying on the current section 354(3) of the Criminal Procedure Code having made a finding that

“The evidence available does appear to be overwhelming.”

and it is hoped those last remarks did not cause prejudice to the appellants/accused persons.

As indicated earlier, I now move to a few other relevant authorities on the issue of retrial decided by courts in Eastern Africa. In ***Vashanjee Liladhar Dossani –V- Rex 13 E.A.C.A. 150***, the Appellant was convicted and sentenced for offences against Defence (price of Goods) Regulations, 1943 in Nyasaland, the present Malawi. On appeal to the High Court of Nyasaland, the court found that although there was evidence on the record which might support the conviction, there were certain unsatisfactory features prejudicial to the Appellant connected with the trial resulting in his not having had a satisfactory trial and the court ordered retrial. The appellant appealed to the Court of Appeal for Eastern Africa against that High Court order for retrial. The appeal was dismissed.

Provisions of the law applicable were section 344(1) (a) (i) of the Criminal Procedure Code of Nyasaland which the Court of Appeal said was in the same terms as the Uganda section under which the case of ***Kamunan –v- Rex 11 E.A.C.A. 122*** had been decided ordering a retrial because the Accused in that case had not been tried satisfactorily. The Uganda section was 314(1) (a) (i) which, was in the same terms as section 354(3) (a) (i) of the Criminal Procedure Code of Kenya before the amendment by Act No. 5 of 2003. the said amendment deleted the last words:

“or commit him for trial,”

Both the High Court and the Court of Appeal found in ***Dossani’s*** case that there was evidence on the record which could support a conviction but nevertheless ordered retrial because of certain unsatisfactory features prejudicial to the Appellant connected with the trial resulting in the trial being unsatisfactory.

Those unsatisfactory features, included wrongful rejection of the evidence of some witnesses and failure to examine an important document during the hearing. The Court of Appeal added another unsatisfactory feature by pointing out that there had been a serious departure from the ordinary approved method of setting the kind of trap in that case. They also pointed out that there had been a failure by the police to record particulars of the money in notes used by the ***“agent provocateur”*** in the trap.

The court of Appeal expressed the hope that at the retrial the points brought out in the appeal were going to receive such consideration as the trial court could think they deserved.

The conclusion therefore was that

“an order for a retrial is the proper order to be made when accused has not had a satisfactory trial.”

A similar order had been made in ***Kamunan’s*** case, cited by the court, where the accused had not had a satisfactory trial.

Quoting a passage from an ***Indian case Varadarajulu Naidu –V- The King 42 Madras 885 and 889*** to the effect that

“It would not....be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge such as this if otherwise sustainable should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite not affecting the merits”

the court of Appeal was quick in pointing out as follows:

“It is not in question that a retrial should not be ordered for the purposes of allowing the prosecution to fill up the gaps in its case, but that is not the case here.

The case would be different were there no evidence on which the Magistrate might have convicted.”

The court was of the view that in the circumstances of that case,

“an order for a retrial was the fairest order to make,”

pointing out that on at least one occasion that court under similar procedure section made an order for a retrial

“on the ground that the trial Judge had failed to consider the accused’s defence.”

My own observation is that ***Dossani’s case*** was a case where the High Court as well as the Court of Appeal saw that each side, that is the Appellant and the Prosecution – Respondent, stood to benefit from the comments both Courts had made. Also the trial court stood to benefit and write a better judgment. The superior courts therefore wanted to give the parties and the trial court the opportunity to restate their respective positions. Otherwise I would say this is a border line and older case.

In ***Kija s/o Sagida, Legwa s/o Gwanda, Holo d/o Batano –vs- Rex 14 E.A.C.A.118***, the Appellant had no advocate during their murder trial in the High Court and, after the close of the prosecution’s case, the trial Judge strongly advised the Appellants to say nothing. The learned trial Judge had properly regarded it as his duty to constitute himself in some degree as their adviser but he went a little too far when he gave such advice instead of simply complying with section 278 (2) of the Tanganyika Criminal Procedure Code which is similar to Kenya’s section 306 (2) of the Criminal Procedure Code. The Court of Appeal for Eastern Africa held that that advice to the Appellants, then accused persons, rendered the trial a nullity.

What had happened was that the evidence which had been given by the Appellants during the preliminary inquiry and put in the evidence before the trial Judge as part of the crown case, taken together tended to incriminate each one of the Appellants. It was pointed out by the Court of Appeal that the learned trial Judge ought also to have considered the possibility of the Appellants retracting or explaining their respective statements made during the preliminary inquiry.

As there was little, if any, evidence against the Appellants other than those statements, the Court of Appeal held the view that a failure of justice may have been occasioned by the Judge’s action and ordered retrial by another Judge.

In that case, the prosecution and the Defence were not to blame. It was the court to blame for the defects but a retrial was ordered because the interest of justice required it, the Court having held the opinion that a failure of justice may have been occasioned, and the court must have been satisfied that the order, when made, was not likely to cause injustice to the appellant. Infact there was a possibility of the appellant being acquitted in the retrial.

Another case where the court was to blame was ***Suke d/o Samwe, Njoka s/o Mulumba, Kitadu s/o Ahungu –Vs- Rex 14 E.A.C.A. 134***. The three Appellants were jointly charged, in the High Court of Tanganyika, with murder. Before the conclusion of the Second Appellant’s defence, the learned trial Judge proceeded to convict the first and third appellants, but deferred sentence until the completion of the Second Appellant’s case. In due course he, too, was convicted.

The Court of Appeal for Eastern Africa held.

“That the course adopted by the learned Judge was irregular and such irregularity was not curable under section 346 Tanganyika C.P.C as it may have occasioned a failure of justice.

“That in joint trial all the accused have a right to hear all the witnesses for the defence, to cross-examine all such witnesses and address the court on the evidence of all such witnesses.

That the court of appeal will not order a new trial in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so

when a nullity was declared on account of an irregularity for which the prosecution was responsible but as neither of the above conditions applied to the present case it was a proper one for this court to order a new trial.

The convictions were quashed and a new trial ordered. Remarks in the concluding paragraph are of interest in this judgment. The courts conclusions was as follows:

“We have come to the conclusion that this is a proper case for this court to order a new trial. This court will not exercise this power in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so where a nullity was declared on account of an irregularity for which the prosecution was responsible.”

All the three appellants had been convicted and each sentenced to death. The sentences all at the same time but the conviction of the First and Third Appellants had been handed down and the sentences stayed before the defence of the Second Appellant was completed by the evidence of his wife who was not available and could not give evidence on the day each Appellant personally defended herself/himself being the day the First and Third Appellants were convicted. The second Appellant’s wife gave evidence some other day and thereafter the Second Appellant was convicted for all the three Appellants to be sentenced at the same time. The Court of Appeal was of the opinion that had there been no irregularity there was evidence which could have warranted a conviction.

But it is better to note, from what the court said, that had the irregularity in this case been blamed on the prosecution, it was unlikely that a retrial could have been ordered. Thus the general trend in these cases is to protect the accused/appellant. To occasion no injustice to him. I will look at a few more cases.

In *Dinu d/o Sombi, Muheri d/o Lesa, Sita d/o Yahl–Vs- Rex 14* E.A.C.A. 136, it was held:

“That since, had the trial Judge followed the procedure laid down in the Code, both his finding and the opinions of the assessors might have been different, the error could not have been cured by the application of section 346 of Tanganyika Criminal Procedure Code.”

The appeal was allowed by the Court of Appeal for Eastern Africa. The trial declared a nullity and retrial ordered. Here the court was to blame. No blame against the prosecution or the Appellant. There was a possibility of an acquittal during the retrial.

In the case of *Salim Muhsin –vs- Salim Bin Mohamed and others (1)* reported in 17 E.A.C.A. 128, the High Court had in an appeal before it, quashed the conviction of the Appellant and set aside the sentence on the ground that the trial Magistrate had misdirected himself. The High Court then ordered retrial on the ground that the quashing of the conviction was through the fault of the Magistrate and not through the fault of the prosecution. The Appellant appealed to the Court of Appeal for Eastern Africa against the order for retrial.

It was held that although the High Court had a discretion to order a retrial, that discretion had to be exercised judiciously, adding true the conviction had been quashed by reason of misdirection by the trial magistrate and that may not have been the fault of the prosecution but the important consideration was that it was not the fault of the accused. The order for retrial was set aside, and it is apparent, in the circumstances of this case, that the interests of justice did not require retrial which was likely to cause injustice to the accused person.

In a Kenya case *Pyaralal Melaram Bassan And Another –v- Republic (1960) E.A.*, 854 the appellants were convicted on circumstantial evidence of the murder of the first appellant’s wife. The appellants appealed against conviction on the grounds that the trial judge had critically examined the defence case before the prosecution case and, having demolished the first appellant’s story to his own satisfaction and in effect, directed the assessors thereon, had treated the falsity of the defence case as a pillar of the prosecution case. It was further contended that in the summing-up, an affirmative prosecution case was not developed at all and the assessors were given the impression that they could give their opinions in

favour of a conviction on the falsity of the defence story. The trial judge had put the case to the assessors in such a way as to leave them little or no room for reaching an independent conclusion on the evidence and the suggestions made by him to them were so forcible that **“it would require assessors of very strong character to come to an independent opinion notwithstanding that they were told that they might disregard his views; the trial judge thereby ran the risk of depriving himself of the benefit of”** the assessor’s independent advice.

The Court of Appeal for East Africa allowed the appeal and ordered retrial stating that although the court held the view that there was evidence on the record which could support the convictions of the two appellants

“there were certain unsatisfactory features connected with the trial resulting in the first appellant not having had a satisfactory trial.”

The second appellant had to be in the retrial because the original trial was a joint trial and

“he may have been prejudiced indirectly by some of the matters which” the court said they had “mentioned in discussing the first appellant’s appeal,”

Here it was the High Court, as the trial court, which was to blame for the setting aside of the convictions. The prosecution and the accused persons (appellants) had no blame, the Court of Appeal stating:

“The judgment, however, is not open to very serious criticism. The difficulties in this appeal arise from the summing-up, and the effect on the minds of the assessors which the wrong approach to the evidence, with its premature emphasis on exhibiting the falsity of the defence and the other defects which we have mentioned, must have had.”

In Muyimba And Others –v- Uganda (1969) E.A. 433, one of the three appellants charged jointly in an offence was represented by an advocate. He had been in custody since May 1968 and the police were aware that an advocate had been instructed in June 1968, at Masaka which was 80 miles from Kampala where the advocate practiced. The advocate was informed that the case was fixed for hearing by telephone only on the morning of the hearing. He was engaged in the High Court in Kampala. The magistrate was not told that the advocate had been informed only that morning that the case was fixed for hearing. The magistrate accordingly allowed the trial to proceed. The appellant appealed on the ground that he had been denied the right to legal representation given to him by the Constitution of Uganda.

It was held, allowing the appeal, that the appellant had been deprived of his right to be legally represented; and that that was a fundamental defect which had the effect of nullifying the trial. ***The Court of Appeal*** held that the trial was defective and that it considered it was in the interests of justice that the appellant be retried in order to allow him be represented by the advocate. The principles in ***Fatehali Manji*** were relied upon.

The court stated that the position was some what similar to the facts in another case, ***Galos Hired – v- R(1944) 2 ALL E.R 50***, a decision of the ***Privy Counsel*** referred to in a later judgment of the ***Court of the Criminal Appeal, Kingston –v- R (1948), 32 Cr. App.R.183*** at P189.

In ***Galos Hired, a case from British Somaliland Protectorate***, an advocate who had been officially assigned to conduct the appeal in Somaliland for the appellant was prevented by war from attending the hearing of the appeal which took place in Somaliland. The appeal was therefore conducted by the appellant in person and dismissed. On further appeal, the ***Privy Counsel*** of the House of Lords in the United Kingdom, held that “the appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it. The Privy Counsel found that the advocate was not at fault. The Appellant’s appeal was allowed by the Privy Counsel which restored the appeal the appellant’s counsel had failed to attend, and ordered rehearing of that appeal in circumstances which would allow the appellant’s counsel to be present.

In Kingston – V- R, the appellate court was satisfied that the appellant had made it clear that she was not going to defend herself at her trial and had relied on being represented by counsel. She had not cross-examined any witnesses and the Assistant Recorder had not allowed counsel to be briefed in court as a “dock brief”. Those facts satisfied the court that there had been a miscarriage of justice and retrial was ordered. That is a case from England.

Contrast those cases with ***Yusuf Gitta –V- R, (1959) E.A.211*** also referred to in ***Muyimba and others*** where the accused person, who was on bond and aware of the hearing date of his case for nearly one month, instructed an advocate on the eve of the hearing date and as a result the advocate could not go to the trial court for the trial because he was engaged elsewhere in the High Court. A request for adjournment contained in a letter produced by the accused from his advocate was rejected by the trial magistrate as the prosecution was ready with all its witnesses and the hearing proceeded. The accused was convicted and sentenced and his appeal was dismissed by the High Court which did not also order retrial:

“It is apparent from Mr. Kiwanuka’s affidavit that when he wrote a letter dated 5th, January 1959, asking the magistrate for an adjournment, he had only just been instructed by the appellant. The appellant had, infact, been at liberty for nearly a month prior to January 5 and so had had ample opportunity to instruct an advocate long before January 5, the date fixed for the hearing of his case. It is plain that the substantial cause of the appellant not being represented by an advocate at his trial was the appellant’s failure to instruct an advocate till the eve of the trial. A contributory cause was the failure of the appellant’s advocate to do his duty to his client.”

It is important to note that where the appeal was allowed, the conviction set aside or quashed and a retrial ordered, the appellate court had found no blame on the part of the appellant or appellants and a retrial was ordered for the purpose of giving the appellant a fair trial because the interests of justice required it and the retrial ordered was not likely to cause an injustice or prejudice to the accused person. That was the position in ***Muyimba And others, Galos Hired and Kingston’s*** cases. In the first case the court and the prosecution were to blame. In the second case nobody seems to have been blamed, if not the court or the prosecution or both. In Kingston’s case the court was to blame. On the other hand in ***Yusuf Gitta*** where the appellant and his advocate were to blame, the appeal was dismissed and retrial refused.

In ***Merali and others –V – Republic (1971) E.A.221*** from Tanzania, the appellants together with two co-accused were charged jointly before a magistrate with stealing goods in transit. The appellants appealed to the High Court of Tanzania against their conviction. The learned judge did not find that the trial was either illegal or defective, but after stating that the magistrate dealt with the defence and not with the prosecution evidence, he ordered a retrial. The appellants appealed again. The Court of Appeal allowed the appeal and set aside the order for retrial. The court stated:

“It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal. A re-trial may also be ordered if the interest of justice so require, without causing prejudice to the accused. -----Each case has to depend on its own facts and circumstance.”

That means that according to Merali’s case a retrial may be ordered,

not only when the original trial was illegal or defective but it may also be ordered when the interest of justice so require, without causing prejudice to the accused.

so that, though in that case there was no finding that the original trial had been either illegal or defective, a retrial may still have been ordered on the basis that the interest of justice required that retrial and that the order for retrial would cause no prejudice to the accused. I get the impression that those are two independent principles, namely,

1. “A retrial may be ordered when the original trial was illegal or defective.”

2. “A retrial may be ordered if the interest of justice require and if no prejudice is caused to the accused.”

yet the same judgment says that

“It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal,”

In the circumstances, the propriety of using the word “**only**” between the word “**ordered**” and the word “**when**” in the first principle in the form found in *Fatehali Manji case* is not there.

It is of interest to note that in the end, the Court of Appeal in Merali’s case found that while there was overwhelming evidence against the first appellant, there was insufficient evidence against the remaining two appellants. The court having set aside the order of a retrial made by the High Court against all the three appellants, went on to dismiss the appeal of the first appellant and allowed the appeals of the remaining two appellants.

In this case, it was the magistrate’s court which was to blame for the quashing of the conviction.

To conclude the part of this judgment dealing with case authorities, I have decided to end with the two cases I consider to be more important because, though decided earlier than some of the authorities already cited, the two cases deal with the issue of retrial more comprehensively than the cases cited earlier. The two cases are *Ahmed Ali Dharamsi Sumar –V- Republic (Supra) and Fatehali Manji –V- Republic (1966) E.A. 343.*

Ahmedi Ali Dharamsi Sumar’s case was under Tanzania law and was decided by Sir Daniel Crawshaw, Sir Clement De Lestang and Duffs, JJ.A,

The appellant was convicted by a magistrate of an offence under the Prevention of Corruption Ordinance. The evidence was that the appellant gave one, O. through one, J., shs. 800/= in order to induce O., as Deputy Chairman of the Transport Licensing Authority, to agree to his substituting a license for a new vehicle for the existing licence of an old vehicle. The Prosecution case depended on the evidence of O. and J. both of whom stated definitely that each of them had seen the appellant at different times on September 4. The Magistrate rejected O. s evidence that he had seen the appellant on September 4, but went on to accept the prosecution case and found the appellant guilty.

On appeal to the High Court the judge held that the magistrate, having rejected a material portion of O.’s evidence, had failed to direct his mind to the evidence of J. about the meeting on September 4. He accordingly allowed the appeal and ordered a retrial. The appellant appealed against the order for retrial.

“Held:

(i) whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person.

(ii) there was ample evidence on which to convict the appellant if the prosecution witnesses were believed, but the magistrate failed to test the evidence of J. in the light of his rejection of part of the evidence of O. ; since on a retrial O. and J. might give different evidence on the very points on which the magistrate had failed to direct himself, it would not be right to cause the appellant to stand another trial.”

Appeal allowed. Order for retrial set aside.

Looking at that judgment more closely, the learned Judges of Appeal noted that in Uganda the powers of the High Court to order a retrial was under section 314 (1) (a) (i) of the Criminal Procedure Code under

which the case of *Salim Muhsin – V- Salim Bin Mohamed and Others (supra)* had been decided. They however pointed out that that judgment had been badly reported as instead of reproducing the excerpts from the judgment stating the reasons for the court refusing to grant a retrial the learned editor quoted an excerpt which had no relation to the order for retrial as set out in the head note of the case. They said they had gone to the original judgment in the relevant case file. ***They stated that in that judgment the Court of Appeal for East Africa had dealt fully with the various cases where an order for retrial should be made under powers of the High Court of Uganda under section 314 (1) (a) (i) which was similar to section 319 (1) (a) (i) of the Criminal Procedure Code of Tanganyika under which retrial was ordered by the High Court in this case of Ahmed Ali Dharamsi Sumar; and I add that it was also similar to the then existing section 354 (3) (a) (i) of the Criminal Procedure Code of Kenya which stated as follows:***

“(3) The court may then, if it consider that there is no sufficient ground for interfering, dismiss the appeal or may-

(a) in an appeal from a conviction –

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial,”

In Kenya, section 354 (3) (a) (i) of the Criminal Procedure Code was amended by Act No. 5 of 2003 removing the last words.

“or commit him for trial;”

Back to *Ahmedi ALI Dharamsi Sumar* case, their Lordships quoted extracts from their courts judgment in *Salim Muhsin* case which dealt with retrial and which they applied in the *Ahmedi Ali Bharamsi Sumar* Case. The quotation said:

“The terms of that section appear to give the High Court on appeal unlimited discretion as to ordering a retrial”

It went on to say:

“but like all judicial discretion must be exercised in a judicial manner and there is a considerable body of authorities as to what is and what is not a proper judicial exercise of this discretion.”

Saying that the matter had been the subject of judicial decision in India where the law was in the same terms as the Uganda section of the Criminal Procedure Code, they went on to state as follows:

“By the Indian decisions it is well settled that a retrial should not be ordered where the conviction is set aside because the evidence was insufficient to establish the charges, or for the purpose of enabling the prosecution to fill up gaps left in their evidence at the first trial. In general the courts in India order retrial only where the original trial was illegal or defective. ---The general trend of these Indian decisions is in harmony with the established principle of English Law, Nemo bis vexari debet pro eadem causa.”

meaning no one should be charged twice in one cause. That is almost like *nemo debet bis puniri pro uno delicto* – meaning, no one should be punished twice for one fault.

Their Lordships pointed out that the learned Chief Justice who had heard and decided the High Court appeal in *Ahmedi Ali Dharamsi Sumar* would appear to have applied a wrong test when he said:

“It has been through no fault of the prosecution that a retrial has been necessitated. I accordingly order a retrial by the same court.”

They remarked:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial. The magistrate’s error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused.”

In the quotation above, the emphasis by underlining are mine.

The Court of Appeal went on to say that it agreed with the High Court that there was ample evidence on which to convict the Appellant if prosecution witnesses were believed. The court added:

“but the magistrate failed to test the reliability of the evidence of Jetha in the light of his rejection of that part of Otieno’s evidence to which reference has already been made. It is possible that on a retrial these two prosecution witnesses might now give different evidence on the very points on which the magistrate failed to direct himself and we are of the view that it would not be right in the circumstances of this case to cause the appellant to stand another trial.”

The Court of Appeal also said that on principle and on the authorities, that court did not consider that was a case where the order of a retrial was justified. The important thing to note is that the Court of Appeal was saying all that despite the fact that the Court agreed with the High Court that there was ample evidence on which to convict the Appellant if prosecution witnesses were believed.

The Court of Appeal referred to the case of ***Pascal Clement Braganza – V- R(1957) EA 152*** stating that

“the court accepted the principle that retrial should not be ordered unless the court was of opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result,”

but the Court of Appeal pointed out that the court in Pascal Clement Braganza’s case.

“did not disagree with the principles as laid down in the Salim Muhsin case.”

It was concluded:

“Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

In ***Fatehali Manji – V- The Republic*** (1966) E.A. 343 where the Appellant was charged with theft of a self starter, the prosecution alleged that it was stolen from a vehicle at Arusha on 6th June 1965 and that the Appellant had it in his possession eight days later when it was resold. The Appellant’s defence was that he had purchased the self-starter from a shop in Nairobi on June 10th 1965, and he produced a receipt. The prosecution led hearsay evidence, that the shop did not exist. The magistrate called a police officer from Nairobi whose evidence he accepted, to testify that the shop did not exist and that was hearsay. The Appellant was convicted. On appeal to the High Court, leave was given to the appellant to adduce additional evidence to establish the existence of the shop, and eventually the prosecution conceded that the police officer was in error and his evidence was hearsay. The judge after hearing that, ordered a retrial being influenced by the inadmissible evidence.

The inadmissible evidence the High Court was influenced with was in certain papers filed by the prosecution, without leave, purporting to set out the evidence of witnesses which the prosecution intended to call for the purpose of establishing the falsity of the receipt produced by the Appellant at the trial. Although counsel for the appellant objected to the course proposed by the learned judge on the ground

that it would permit the prosecution to put up a different case from that at the trial and be unfair to the Appellant, the learned judge ordered a retrial having regard to the papers filed by the prosecution without leave.

On further appeal to the Court of Appeal for East Africa, Sir Clement de Lestang, Ag. P., Spry, Ag. V.P. and Law, J.A, the question for decision was whether the order for retrial was justified or not. The Court of Appeal set out the general principles upon which a court should or should not order retrial stating that:

“.....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

The court said that applying those principles to the case before it, it was clear that the original trial was neither *illegal nor defective*. The court added:

“We think that had the learned magistrate not been misled regarding the existence of the shop in question he would in all probability, have acquitted the appellant and a new trial may deprive the appellant of that chance of acquittal. Moreover, in a new trial the prosecution would be able to lead evidence which it had not led at the original trial and take a stand different from that which it look at the trial. In all these circumstances we are of the view that to require the appellant to stand trial again would be unfair. The appeal is accordingly allowed and the order of retrial set aside.”

To my mind, the concluding part of that judgment highlights three of the principles, emerging from the first passage I have quoted from the case of *Fatehali Manji*; the first of the three principles being that

“in general a retrial will be ordered only when the original trial was illegal or defective;”

while the second of the three principles is that

“a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence”

and the third of the three principles is that a retrial

“will not be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial.”

That is because it is in respect of the first principle that the court said that it was **“clear that the original trial was neither illegal nor defective”**; and it is in respect of the second principle that the court said the magistrate **“would in all probability, have acquitted the appellant and a new trial may deprive the appellant of that chance of acquitted;”** while it is in respect of the third principle that the court said:

“moreover in a new trial the prosecutor would be able to lead evidence which it had not led at the original trial and take a stand different from that which it took at the trial.”

I should make it clear at this stage that I have not said that only those three principles emerge from the case of *Fatehali Manji*. What I have said is that those are three of the principles emerging from that case and that they are highlighted in that concluding part of the judgment as I have explained.

Otherwise looking more closely at that case as a whole, the very first principle which emerges is of a general application and that states that

“in general a retrial will be ordered only when the original trial was illegal or defective.”

It means that the first question to be asked when an issue of a retrial is before an appellate court for resolution is whether the original trial was illegal or defective or otherwise and the use of the word “only” in that principle should not be ignored. To get the answer to that question, the court has to consider the particular facts and circumstances of that case, and that leads to the second principle emerging from the case of *Fatehali Manji* stating:

“each case must depend on its particular facts and circumstances”.

Those two principles having been observed, the appellate court will be put in a position to say whether there had been sufficient or insufficient evidence. The court will also be in a position to say whether or not there are gaps in the evidence. All that will enable the appellate court to observe the third and fourth principles, where applicable, the third principle stating that

“a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence”

and the fourth principle stating that

“a retrial will not be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial.”

All those four principles having been observed, the fifth principle, also from the case of *Fatehali Manji*, will come into play because a superior court exercising its discretion judiciously ought to be able to see the limits imposed upon that discretion from judicial decisions and written law so that where the order for a retrial has to be made, the court is able to discern, from the facts and circumstances of that case, that the interests of justice require such an order to be made and that the order when made is not likely to cause an injustice to the accused person, so that by doing so the court will be observing the fifth principle which states that

“an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

This is the principle which the court in *Fatehali Manji* was considering when it said that a retrial would be “*unfair*” to the appellant in that case and refused to order retrial.

The term “mistrial” has sometimes been used. That is a trial vitiated by some error or an inconclusive trial. An error is a mistake or inaccuracy. It is something one makes without one knowing that he is making it. It is something done unintentionally. When someone does what he already knows is wrong, that cannot be described as an error on his part. As I have said somewhere in this judgment the trial magistrate has no blame when the prosecution uses an unqualified public prosecutor. The trial magistrate cannot therefore be said to have made an error. He made no mistake. The Attorney General, on the other hand, cannot be said to have made an error. This is because he did something he knew was wrong. He cannot be said to have made a mistake. He decided to do a wrong thing knowing it was wrong and did it. That is no mistake and such a trial cannot be said to have been vitiated by some error.

Alternatively, such a trial cannot be said to have been inconclusive. It was fully concluded leaving the appellant only to appeal against the conclusion.

It means therefore that the term “mistrial” is not applicable to the category of trials in which the appeals before me fall and in those category of cases when the court, like in the case of *Roy Richard Elirema*, says that the trial was a nullity on account of a prosecution by an unqualified public prosecutor, that court is not meaning to say that there was a mistrial. A nullity is the state of there being nothingness, want of form or existence or force or efficacy. That is different from a mistrial.

Both terms “mistrial” and “nullity” were not used in the case of *Fatehali Manji*. The term “null” is not in that case, because that case is not of the same category as the appeals before me with an unqualified prosecutor.

Where a trial is null, legally, it means there was no trial. The court, like in **Roy Richard Elirema's** case or in the appeals before me now, was independent and impartial established by law which conferred upon that court competent jurisdiction. There was no defect in the charge. However, the trial became null because the prosecution was conducted by an unqualified prosecutor. That trial may be said to have been illegal or defective. Something illegal is something unlawful. It is an act which the law forbids as to steal somebody's property or to assault somebody. The law required the prosecution to be conducted by person of a particular class but the Respondent ignored that law and used a person not qualified to be included in that class of people. That situation is not the same as a situation which is disregarded or is not recognized by the law.

To my mind, that is a situation where the word "defective" will apply. What was done was imperfect. It was having a defect and indeed a fatal defect which rendered the trial null. That being the position, I now realize I should not have said, at the bottom of page 19 of the judgment in the case of **Pharis Mutembei Mutegi** that **Fatehali Manji's** case did not cover the category of cases affected by the Kenya Court of Appeal's decision in the case of **Roy Richard Elirema**.

The correct position is that Fatehali Manji's case covers every category of cases except that it is apparent that by the time that case was decided, the **Roy Richard Elirema** category of cases had not come up on the issue of retrials. As already noted elsewhere, not only did **Fatehali Manji's** case set out the general principles upon which a court should or should not order retrial but also spelled out specific principles upon which a court must not order retrial.

That brings me to the end of the case authorities I have had the opportunity to consider. One thing to note is that, although the law under which those cases were decided had given unlimited discretion to courts to order retrials, appellate courts in their judicious consideration and wisdom felt there must be some restriction and went a head to spell out those restrictions to meet the ends of justice. The scope of that restriction was neither limited nor defined. It was not exhaustive and therefore was not impervious to new developments in case law as dictated by new facts and new circumstances such as have come to exist later in the **Roy Richard Elirema** category of cases which were not known in East Africa during the time of the Court of Appeal for Eastern Africa or the time of the East African Court of Appeal and the United Kingdom's Privy Council.

Had that category of cases been there during that time, I am convinced those courts would have come up with a very clear and specific principle about those particular cases. Nevertheless, those judgments are useful today bearing in mind that the general trend throughout those judgments as can be discerned, was to protect the accused or appellant by ensuring that the interests of justice are met without injustice being caused to the accused or appellant. This was despite the fact that a majority of "Natives", in this part of the world did not, during that time, have the human and constitutional rights all are enjoying today. With the existence and availability of human and constitutional rights therefore, the accused or appellant today ought to be in a much better position than his counterpart in the days before Eastern Africa countries attained their respective political independence from their colonial masters. Moreover the 2003 amendment to section 354 (3) (a) (i) of the Criminal Procedure Code in Kenya ought to be taken into account in Kenya.

It should not therefore be lost to us that in cases such as **Salim Muhsin** it was said:

"true the conviction had been quashed by reason of misdirection by the trial magistrate and that may not have been the fault of the prosecution but the important consideration was that it was not the fault of the accused."

In Suke And Others –V- Rex, it was stated that

"the Court of Appeal will not order a new trial in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so when a nullity was declared on account of an irregularity for which the prosecution was responsible;"

and the Court, in *Ahmedi Ali Dharamsi Sumar* was more to the point stating:

“it is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial.”

Before consideration of the relevant law therefore, the principles emerging from the totality of all the case authorities cited can be summed up together as follows:

In general a retrial will be ordered only when the original trial was illegal or defective, and from the particular facts and circumstances of the case, the appellate court is of the opinion that on a proper and judicious consideration of the admissible or potentially admissible evidence, a conviction might result, and further that the court is satisfied, not only that the interests of justice require the order for a retrial to be made, but also that such an order when made is not likely to cause injustice to the accused person;

Provided that:-

(a) a retrial will not be ordered where the conviction is set aside or quashed because of insufficiency of evidence;

(b) a retrial will not be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the original trial;

(c) a retrial will not be ordered where conviction is set aside or quashed because it was vitiated by an illegality or other defect for which the prosecution is to blame.

That is on the basis of case law. I now turn to the written law beginning with the current constitution of Kenya relevant to the issue of retrials. This is important because if an appellate court, as was said in the Nairobi High Court case of *Pharis Mutembei Mutegi*, is entitled to consider, at least to some extent, the merits of the prosecution case, and I suppose also the merits of the defence case, before deciding whether or not to order a retrial; the relevant law must also be considered to enable the court be in a proper position when deciding whether the interests of justice would be served without prejudicing the accused in the circumstances of each case. Starting with **Section 77 of the Constitution** which makes provisions to secure protection of the law and is found in Chapter V providing for the protection of Fundamental Rights and Freedoms of the Individual, I will refer first to subsection (1) which states as follows:

“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

Subsection (5) of section 77 comes in to add:

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.”

There must be legislation or law enabling those constitutional provisions to be implemented and that legislation or law is the Criminal Procedure Code where the relevant portions in section 354 (3) (a) (i) and (3) (c) state as follows:

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may

(a) in an appeal from a conviction

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or

(ii)

(iii)

(b)

(c) in an appeal from an acquittal.....hear and determine the matter of law and thereuponremit the matter with the opinion of the High Court thereon to the subordinate court for determination whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary,.....”

That is in relation to appeals. Concerning revision, the relevant provision of the *Criminal Procedure Code* is section 364 which states:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may:-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

Those are the provisions which give a superior court in Kenya power to order retrials. Sections 354 and 364 of the *Criminal Procedure Code* putting into effect section 77 of the current Constitution of Kenya. I should explain that section 357 of the *Criminal Procedure Code* gives the superior court power to admit the appellant to bail or to suspend the sentence pending hearing and determination of that appellant’s appeal. Section 358 gives the superior court power to take further evidence. Power under sections 357 and 358 is therefore not my concern in these appeals.

In paragraph (a) (i) of subsection (3) of section 354 of the *Criminal Procedure Code* when it is said,

“or order him be tried by a court of competent jurisdiction,”

it appears as if the trial is ordered because the original trial was not in a court of competent jurisdiction, suggesting, further, that the original trial was illegal. If that is so, it may be said that in relation to a conviction, a retrial in Kenya to day ought only be ordered where the original trial was in a court which had no jurisdiction. Many will disagree with me on that point but a question may be asked: if what I am saying is not correct, why did the Legislature have to include the words

“by a court of competent jurisdiction”

at that point of that provision especially when that provision is looked at in its original form where the words in the quotes just above were immediately followed by the words

“or commit him for trial”

without repetition of the words

“by a court of competent jurisdiction”?

As pointed out elsewhere in this judgment the words

“or commit him for trial”

were removed by Act No. 5 of 2003 leaving the rest of section 354 (3) (a) (i) the way it is today. For clarity, I may repeat that before the said amendment, subsection (3) (a) (i) stated as follows:

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –

(a) in an appeal from a conviction –

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial.”

The amendment by Act No.5 of 2003 removed the last clause which stated:

“or commit him for trial.”

With the exception of cases in Kenya decided after the amending Act No. 5 of 2003, was passed, the law under which the authorities cited herein were decided in respective Eastern Africa countries was in exactly the same terms as those in section 354 (3) (a) (i) of the Kenya Criminal Procedure Code before the said amendment. India was having similar provision. Courts were therefore saying they had a wide or unlimited discretion to order retrial. But in their exercise of that discretion those courts in their wisdom as seen earlier, came up with definite principles I summed up earlier in this judgment.

Had their Lordships in those cases been working under a section of the law framed in the terms found in the present and amended section 354 (3) (a) (i) of the Kenya Criminal Procedure Code, the number of retrials they ordered may have been less than what those authorities show today to be and in those circumstances, I am not seeing anything which could have hindered the **Roy Richard Elirema** category of cases, were they to emerge during those days, from being among cases where a court will not order retrial. Yet, as I have pointed out elsewhere, those cases were decided during the days when majority of the “Natives” affected in this part of the world, could not be said to have been enjoying human or constitutional rights under their Colonial Masters.

In law, a trial which is a nullity is a trial which never was a valid trial. It is a trial which was null, legally invalid and therefore void. That trial or the proceedings, when declared a nullity by a superior court, nothing remains, including the charge sheet or information whichever may have been used, and therefore, in law, there remains no case to be remitted to the lower or trial court for a retrial or for anything else. This is because a trial in court starts with the filing of a charge sheet or an information and those are documents which must remain there to sustain the trial. Once that trial is a nullity and a superior court so declares, the charge sheet or information are included. It means there remains no lawful cause to continue holding the affected appellants or accused persons in detention, hence the imperative to set them free so that if the prosecution later decides to charge them a fresh, the prosecution may do so when the appellants or accused are free persons and the prosecution has to institute the proceedings by a fresh charge sheet or information in a completely new and separate criminal case supported by a fresh supply of witness statements, where such witness statements had been supplied to the accused person or his advocate prior to the nullified trial. This is a different situation from a retrial where the original trial had not been declared a nullity and therefore the original charge sheet or information continues to exist.

The term “retrial” will however still be there because even though the original trial is nullified and therefore, legally, it is as if no trial took place, in reality and in practical terms, there was a trial, call it a purported trial or an invalid trial and we cannot escape from that practical or naked truth. That is why the question of injustice or unfairness to the accused person arises and it cannot judiciously be said that the interests of justice require such a retrial however grave the charge may be.

Further to what I have just stated above and to delve a little deeper, it is the institution of a fresh criminal prosecution; after the first or original prosecution or trial has been found to be a nullity and the conviction or acquittal quashed or set aside that the prosecution should be stopped from doing, whether the prosecution starts a fresh criminal trial wrongly using the charge sheet, or information, and other

documents previously used in the nullified trial or starts a fresh trial correctly using completely new documents in a new and separate criminal trial.

While it is as much in the public interest or in the public policy that breaches of the law should be punished and it is true there is no time limit to the prosecution of serious offences except where a statutory limitation is imposed, it must be ensured that in the process of doing so, the fruits of the action prompted by that public interest or public policy are the interests of justice. The fruits must be **the interests of justice** so that injustice is not caused to the people affected, the appellants or the accused persons.

It is recognized that under section 26 (3) of the Current Constitution,

“The Attorney General shall have power in any case in which he considers it desirable to do so-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;”

and subsection (8) adds that –

“In the exercise of the functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55, the Attorney General shall not be subject to the direction or control of any other person or authority.”

Let me explain that subsection (4) concerns the Attorney- General’s power to require the Commissioner of police to investigate any matter relating to an offence. Section 44 concerns the power of the Attorney General to make an application to the High Court for the determination of a question whether a person has been validity elected as a member of the National Assembly or whether a seat has become vacant. Section 55 concerns the power of the Attorney General to file suit in the High Court to recover penalty from an unqualified person sitting or voting in the National Assembly. Those provisions do not concern us in this judgment.

What concerns us is what subsection (3) (a) of section 26 says and what the rest of subsection (8) of the same section says as set out above. In that respect what is stated in section 123 (8) of the constitution must also be taken into account as it states that:

“No provision of this constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this constitution or any other law.”

It is on the basis of section 123 (8) as read together with section 77 (1) and section 84 (1) of the current constitution as well as other enabling provisions of the law, in the light of the inherent powers of this court, that this court is saying that the Appellants, if retried, will be deprived of the protection of the fundamental rights, or some of them, given by section 77(1) of the constitution. The problem in these appeal proceedings is not that the court before which retrial will be held will not be an independent and impartial court established by law. The problem, without casting any aspersions on any retrial officer, is that the retrial will not qualify as **“a hearing within a reasonable time”** and as **“a fair hearing.”** That will amount to abuse of the process of the court because such retrial will be oppressive and vexatious and section 84 (1)of the Constitution protects the Appellants from such abuse. But since these appeals are not an application by the Appellants under section 84 (1), this court has to revert to its inherent powers and provisions of the Judicature Act (cap 8) and say that it will not be in the interests of justice to order retrial. Retrial will cause injustice and will be unfair to the Appellants.

The fundamental rights conferred by section 77 (1) as protected by section 84(1) of the Constitution must not be offended. Otherwise what is the use of having a Constitution if it is not honoured and respected by

a Government elected by the people who may as a result lose faith in the said constitution on the ground that the constitution has failed to give effective protection to the people's fundamental rights?

Moreover, as I am saying this, it should be noted that not only is Kenya a member of the United Nations but the country has also ratified the "International Covenant on Civil and Political Rights" adopted and opened for signature, ratification and accession by the United Nations General Assembly Resolution 2200A (XXI) of 16th December 1966 and brought into force on 23rd March 1976, in accordance with Article 49.

Article 14(7) of that Covenant states:

"No one shall be liable to be tried or punished again for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

In these appeals although the conviction by the trial court may be said not to have been fully

"in accordance with thepenal procedure of"

this country because it was done without compliance with section 85(2) of the Criminal Procedure Code, it was in accordance with the law and the subsequent quashing of that conviction by the High Court following nullification of the trial held in the magistrate's court can, for the purpose of Article 14(7) of the Covenant, be said to be an acquittal substantially done

"in accordance with the law and penal procedure of"

this country. Hence the appellants become not liable to be tried or punished again.

Furthermore, by using an unqualified Public Prosecutor, the Attorney General was contravening section 77(1) of the Current constitution of Kenya which is similar to Article 10 of the United Nations Universal Declaration of Human Rights which states:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Emphasis are mine and are meant to point out that there can be no fair hearing in a trial where the prosecutor is unqualified to prosecute as his prosecution is rendered incompetent and the trial a nullity thereby prejudicing both the victim and the accused person in contravention of the protection which section 77(1) of the Constitution and Article 14(7) of the Covenant mandate should be afforded to persons charged with criminal offences. There can be no fair trial when an accused person, who may or may not have been on bond, passes through the rigour of a full trial, convicted, sentenced and pays a fine or committed to jail where, as a result, begins to serve the sentence or waits, in agony for his sentence to be executed, only to be told at the conclusion of a taxing appeal that his trial was a nullity and that therefore he should face a retrial. He goes through the rigour of a full retrial facing sufferings similar to, or worse than, those which he had gone through during the original trial. He is in the end convicted or acquitted. All those through no fault of his. Such contravention of constitutional rights, human rights as well as Civil and political rights is very serious as it is oppressive and vexatious and the perpetrator, who is the prosecution, should not be granted retrials however grave the charge may be, as granting him such retrials amounts to condonation of the prosecution's negligence as well as condonation of the prosecution's contravention of the appellants or accused's constitutional and human rights thereby encouraging the prosecution to continue causing injustice or unfairness to more and more appellants or accused persons.

To conclude this judgment therefore, I hold the opinion, from the discussion herein, that the emerging of ***Roy Richard Elirema category of cases*** in today's Kenya which is professing the rule of law; adherence to and application of the principles of human rights, civil and political rights as well as constitutional rights of the individual; deserves a special and specific place among principles applicable in retrials so far established in this country. The specific principle derives and justifies its special place from the reasoning

given by the Court of Appeal in Roy Richard Elirema's case as clarified in that Court's reasoning in Wilfred Shilingi's case and in addition there are facts of the relevant law. Starting with the reasoning in Roy Richard Elirema as clarified in Wilfred Shilingi, the order for retrial was refused mainly because:

the mistakes which occur during such trial leading to the quashing of the conviction are all of the prosecution's making and there is absolutely no good reasons why the Attorney General should not appoint or was not appointing qualified public prosecutors to conduct the Republic's cases in the courts.

On the law;

Such a retrial contravenes section 77(1) as protected by section 84 (1) of the current Constitution of Kenya and Article 10 of the Universal Declaration of Human Rights as well as Article 14 (7) of the International Covenant on Civil And Political Rights.

From the above therefore, the specific principle coming out of ***Roy Richard Elirema*** category of cases is that

No retrial will be ordered where the original trial is a nullity and the relevant conviction or acquittal quashed or set aside on account of a prosecution by an unqualified prosecutor.

On the whole therefore; the analysis and careful consideration of what I have been saying, including the cited case authorities and the relevant law referred to, lead to the following summed up final principles emerging with regard to the issue of retrial:

In general a retrial will be ordered only when the original trial was illegal or defective, and from the particular facts and circumstances of the case, the appellate Court, or the court on revision, is of the opinion that on a proper and judicious consideration of the admissible or potentially admissible evidence, a conviction might result, and further that the court is satisfied, not only that the interests of justice require the order for a retrial to be made, but also that such an order when made is not likely to cause injustice to the accused person;

Provided that no retrial will be ordered:-

(a) where the conviction is quashed or set aside because of insufficiency of evidence;

or

(b) where the purpose is to enable the prosecution to fill up gaps in its evidence at the original trial;

or

(c) where the original trial is a nullity and the conviction or acquittal quashed or set aside on account of prosecution by an unqualified prosecutor.

or

(d) where the conviction or acquittal is quashed or set aside because it was vitiated by an illegality or other defect for which the prosecution is to blame;

The applicability of any one of the above four provisos (a) to (d) to an original trial is sufficient to stop a retrial.

Applying those principles to this case, I have said the trial was defective. That is an element favouring a retrial. But from the particular facts and circumstances of the case as earlier on given in this judgment and

on a proper and judicious consideration of those facts and circumstances, I found inconsistencies, contradictions, doubts and even gaps in the prosecution's evidence, leading to the conclusion that were it not for the fact that the prosecutor at the trial was unqualified, the convictions were going to be quashed because the evidence was insufficient to support the convictions and there were gaps in the prosecution's evidence. That, of course, would not have made the trial a nullity but would have brought this case under proviso (a) and proviso (b) of the aforementioned principles, whereby a retrial will not have been ordered. That answers the first question I posed at the beginning seeking to know whether I would have ordered retrial after allowing the appeals had the prosecution been conducted by a qualified prosecutor. In short, the answer is I will not have ordered retrial.

That leads me to the second question which was that if the answer to the first question is in the negative, why should I order retrial now where the prosecutor was unqualified to prosecute the same case? The simple answer is that in all fairness, no retrial is justified. The convictions in this case were quashed because they were vitiated by another defect for which the prosecution is to blame, namely, prosecution of the case by an unqualified prosecutor in contravention of section 85 (2) of the Criminal Procedure Code. That means proviso (c) and proviso (d) in the principles set out above do also apply to stop a retrial. That being the position, I am not satisfied that the interests of justice require the order for a retrial in this case. I am not also satisfied that the order for retrial, if made in this case, is not likely to cause injustice to the appellants. Indeed I hold the view that such an order if made, will not only cause injustice to the Appellants and be unfair to them but will also result into an abuse of the process of the court.

Accordingly, I do hereby decline to order retrial of the appellants who, I understand, are not in custody.

Delivered, dated and signed at Nyeri this 9th day of March 2006.

J. M. KHAMONI

JUDGE